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IN THE

Supreme Court of the United States

October Term, 1981

LEONARD H. TOSE, TOSE, INC.,
and
THE PHILADELPHIA EAGLES FOOTBALL CLUB,
Petitioners

v.

FIRST PENNSYLVANIA BANK, N.A., JOHN R. BUNTING, JOHN C. PEMBERTON, HERBERT BARNESS, SIDNEY FORSTATER, PROVIDENT NATIONAL BANK, THE CHASE MANHATTAN BANK, N.A., GIRARD BANK, PHILADELPHIA NATIONAL BANK, and JOHN D. FIRESTONE,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS FIRST PENNSYLVANIA BANK, N.A., JOHN C. PEMBERTON, JOHN R. BUNTING AND SIDNEY FORSTATER

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should review a holding that an alleged conspiracy between two limited partners, the chief financial officer of the partnership, the bank which extended credit to the partnership, and two executives of that bank to force the general partner to sell his controlling partnership interest in a professional football team was not shown to have had either the purpose or effect of diminishing competition in a relevant market segment and, therefore, was not actionable under Section 1 of the Sherman Act.

2. Whether this Court should grant review where the district judge directed a verdict in favor of the same defendants under the following circumstances:

(a) All of the alleged conspirators, when called as on cross-examination, denied participating in any conspiracy and offered valid business explanations for their individual actions vis-a-vis the general partner-plaintiff;

(b) The trial judge concluded as a matter of law (at the conclusion of the evidence on the plaintiffs' claims), and a jury concluded as a matter of fact (at the conclusion of the trial of the consultant's counterclaim against the plaintiffs), that the consultant was *not* a disloyal employee who agreed, assisted, aided, abetted *or* collaborated with the bank to force the general partner to sell his interest in the partnership, and the court of appeals determined that the trial of that counterclaim was free of error;

(c) The plaintiffs failed to produce any other evidence from which a jury could reasonably infer circumstantially the existence of a conspiracy, and

(d) On the contrary, it appeared that each of the limited partners was involved in a separate, bona fide, and long standing dispute with the general partner and took actions with respect to him which, while some occurred during the same general time period as the actions taken by the Bank, were fully explained in terms of the partners' individual responses to the general partner's individual actions with respect to each of the limited partners.

3. Whether this Court should review a holding that the bank did not violate the Bank Holding Company Act by requiring, as a condition to continuing to extend credit, that the borrower place a specific financial consultant in charge of the borrower's financial affairs, where the bank's loan agreement specifically required that the borrower "maintain management satisfactory to the bank"; there was "substantial evidence that (the bank) had good reasons to be concerned about its loan," and the consultant selected by the bank was a competent individual who had been the borrower's chief financial officer when the loan was made and for seven years thereafter.

4-6. With respect to petitioners' contentions respecting the alleged conspiracy to deny credit and conspiracy to fix interest rates, these respondents adopt the Counter-Statement of Questions Presented in the Brief filed by respondents Girard Bank, Philadelphia National Bank, and Provident National Bank.

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This Brief is filed on behalf of respondents First Pennsylvania Bank, N.A., John R. Bunting, John C. Pemberton and Sidney Forstater.[1]

OPINIONS BELOW

The reported opinions below are provided in the Appendix to Petition for Writ of Certiorari ("P-App."). The portion of the trial transcript dealing with the district court's direction of verdicts with respect to these respondents is attached to this Brief as part of the Appendix ("R-App.").

JURISDICTION

As set forth in the Petition for Writ of Certiorari, jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

1. First Pennsylvania Bank, N.A. ("FPB") is a wholly owned subsidiary of First Pennsylvania Corporation, a publicly owned corporation. Subsidiaries of FPB which are not wholly owned are Tinicum Real Estate Holding Corporation (62.5%), Greater Philadelphia Venture Capital Corporation (12.72%), and Southeastern Pennsylvania Development Fund (9.47%).

STATUTES INVOLVED

The statutes involved in the Petition for Writ of Certiorari are:

§ 1 of the Sherman Act, 15 U. S. C. § 1;[2]

§ 4 of the Clayton Act, 15 U. S. C. § 15;[3]

The Bank Holding Company Act, 12 U. S. C. § 1972(1)(C).[4]

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2. 15 U. S. C. § 1 provides in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

3. 15 U. S. C. § 15 provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

4. 12 U. S. C. § 1972(1) provides:

A bank shall not in any manner extend credit "*** on the condition or requirement *** (C) that the customer provide some additional property, or service to such bank, other than those relating to and usually provided in connection with a loan ***."

COUNTERSTATEMENT OF THE CASE

The Scope of This Brief.

At the time of the events complained of by petitioners, respondents Bunting and Pemberton were, respectively, the Chairman of the Board and one of three vice chairmen of First Pennsylvania Bank, N.A. First Pennsylvania is referred to in this Brief as "FPB", and these three respondents are referred to collectively as "the First Pennsylvania respondents." Respondent Forstater is a certified public accountant and independent financial consultant who was employed in that capacity by petitioner Tose for almost twenty (20) years prior to the events complained of, was the financial vice president of the Philadelphia Eagles from the time Tose acquired control of the team in 1969 until Forstater resigned as an employee to become the team's outside financial consultant in the spring of 1976, and was re-employed by the Eagles at the request of the First Pennsylvania respondents as of May 1, 1977.

The actions complained of by petitioners occurred during two distinct time periods and, generally speaking, the acts vis-a-vis petitioners and the other respondents of the First Pennsylvania respondents and respondent Forstater took place up to and including August 8, 1977 and were alleged to have been taken in conjunction with actions of two of petitioner Tose's limited partners (Herbert Barness and John Firestone) for the alleged purpose of forcing a distress sale of Tose's general partnership interest in the Philadelphia Eagles.

On July 29, 1977, the First Pennsylvania respondents, acting pursuant to an express provision of FPB's loan agreement which required that Tose and the Eagles "maintain management satisfactory to the Bank," caused Tose, as a condition to FPB's continuing to extend credit to the Eagles and lending the Eagles additional funds, to place

Forstater in charge of all matters pertaining to the Eagles' financial management. However, Tose continued as the sole general partner of the Eagles, and between July 29 and August 8, 1977, FPB not only continued the credit which FPB had previously extended to the Eagles, but loaned the Eagles an additional $140,000.

On August 8, 1977, Tose, with the assistance of an owner of another National Football League ("NFL") franchise, caused a Detroit bank to loan the Eagles enough money to pay off FPB, plus additional funds, for up to six months, during which time the Eagles sought and ultimately obtained (again with NFL assistance) additional financing. During that period Tose and the Eagles did encounter difficulties in obtaining credit, not only with the four other bank respondents, but with nineteen more banks throughout the United States, Canada, South America, and Europe. However all of these difficulties were fully explainable in terms of undisputed facts concerning petitioners' financial condition and general credit background.

The district court after analyzing the evidence, directed a verdict on the ground that petitioners had failed to sustain their allegations pertaining to a conspiracy among the respondents (R-App. A-1-12). The court of appeals affirmed on the ground that the events which occurred prior to August 8, 1977, and involved the alleged plot to force Tose to sell his general partnership interest in the Eagles, were not shown to have adversely affected competition in any market place (P-App. 26-28), and that petitioners had produced no evidence whatever that any other bank acted as it did with respect to petitioners as the result of any discussion or contact had with any of the First Pennsylvania respondents (P-App. 29).

The purpose of this Brief is to analyze the evidence concerning the events which occurred through August 8, 1977 and petitioners' contentions that this Court should review the holdings below that, as a matter of law, the petitioners' evidence did not establish a Sherman Act conspiracy or a violation of the Bank Holding Company Act.

Petitioners' other contentions, and the evidence concerning them, are discussed in detail in the Brief filed on behalf of the respondents Girard Bank, Provident Bank and Philadelphia National Bank. The arguments of those respondents on those subjects are adopted here without restating them.[5]

Conclusions From the Evidence of the Trial Judge, the Jury, and the Court of Appeals

From the inception of this case, petitioners' contentions have been advanced on the basis of "factual" assertions which in many instances are not factual but rather unfounded speculation. In other instances, the assertions have been based on facts extracted from their historic contexts and jumbled chronologically for purposes of generating confusion. The Statement of Facts in the Petition for Certiorari follows the same pattern.

The very experienced district judge did not direct verdicts in favor of the respondents until he had reviewed daily trial transcripts, afforded petitioners' counsel an opportunity to condense and define their theories of action in a final memorandum of law, and listened to a day and a half of legal arguments with respect to the alleged merits of petitioners' multifarious contentions. The judge's ultimate conclusions, on the subjects covered in this Brief, were stated as follows (R-App. A-2-3):

> "* * * I have carefully reviewed the evidence to determine if a jury could reasonably infer from the evidence the conspiracy alleged. I feel the evidence

5. The Petition also refers, in the Statement of Questions Presented, to the directed verdicts and summary judgments in respondents' favor on Count III of the Complaint, asserting pendent tort claims under state law. This aspect of the case is not addressed in petitioners' statement of reasons for granting the writ, nor otherwise considered in the Petition, and therefore is not responded to herein. However, we have included in the Appendix to this Brief the portions of the district judge's bench opinion on this subject (R-App. A-12-14).

totally is inadequate to permit such an inference. The evidence does establish that at various times Mr. Tose and the Eagles were involved in several separate disputes with the partners, Firestone and Barness, and with its bank, First Pennsylvania Bank. However, there is no evidence to tie these separate disputes into the complaint of conspiracy.

* * *

"* * * There is no evidence that Mr. Forstater was a disloyal subordinate or that First Pennsylvania had any reason to know or believe that Mr. Forstater was a disloyal subordinate". (R-App. A-13)

At the conclusion of the trial of respondent Forstater's counterclaim against petitioners, the jury answered a special Interrogatory as follows:

"Was Mr. Forstater a disloyal employee who agreed, assisted, aided, abetted *or* collaborated with officers or employees of the First Pennsylvania Bank to attempt to force Mr. Tose to sell his share of the Eagles?

ANSWER: "No."

The court of appeals also concluded that the trial of the Forstater counterclaim was free of error (P-App. 41-42) and petitioners do not suggest that this Court should review that conclusion. Nor do petitioners seek review of the conclusion of the court of appeals (P-App. 30-31) that an actionable conspiracy could not have consisted of an agreement between FPB and the executives through whom it took action with respect to petitioners, namely, respondents Bunting and Pemberton. Accordingly, the only facts which might possibly be relevant to the Petition and the issues discussed in this Brief are those pertaining to the alleged conspiracy between FPB and petitioner Tose's former partners, Herbert Barness and John Firestone,

and the propriety of FPB's actions with respect to the petitioners under the provisions of the Bank Holding Company Act.

The court of appeals noted that (P-App. 8) "*** the answers to the legal issues presented by this appeal depend on the factual predicate," for the evaluation of which the court concluded that it was "*** necessary to set forth a lengthy narrative" which that court then proceeded to set forth "*** in the light most favorable to appellants." The great majority of those facts are set forth in the Opinion of the court of appeals (P-App. 8-23), and we do not propose to burden this Court by restating many of them. However, in addition to the facts set forth by the court of appeals, we refer the Court to these additional facts which were also established by uncontradicted testimony introduced through petitioners' witnesses.

The FPB Loans

FPB's original loans to Tose, totalling $10,500,000, were the largest made to that date for the purchase of an NFL franchise, and FPB made the loans even though FPB could not persuade any other Philadelphia bank to participate. Tose invested only $1,555,000 of his own funds in the venture and obtained $4,000,000 from other investors. Thereafter, four of those investors rejected Tose's proposal that they accept limited rather than general partnership interests in the Club and instituted suit against Tose. This is why, in 1972, Tose and the Eagles borrowed an additional $2,678,000 from FPB to pay off those investors.

Tose's Credit Background

To a very large extent, Tose's ability to obtain credit from FPB stemmed not only from his interest in the Eagles, but a personal financial statement which reflected Tose's ownership of a trucking company (Tose, Inc.), which Tose had inherited from his father in 1967, and marketable securities which Tose obtained in 1969 in exchange for a canning company, in which Tose had also

inherited an interest from his father, and then sold. However, between 1969 and 1976, the financial condition of Tose, Tose, Inc. and the Eagles deteriorated dramatically. Tose's net worth in March of 1969 was $12.5 Million Dollars. As of June 30, 1975, Tose's financial statement reflected a net worth of $5.7 Million Dollars, and that figure included a $3.1 Million Dollars valuation of Tose, Inc. However, Tose, Inc. had lost $1 Million Dollars in 1975 alone, and when Tose tried to sell Tose, Inc., in the spring of 1976, he was offered $500,000. At year end 1976, Tose, Inc., had a retained earnings deficit of approximately $2,600,000 against capital of about $400,000. Tose, Inc., had not been able to pay rent for real estate leased from Tose, or to pay real estate taxes, for several years.

By the end of 1976, Tose no longer owned the stock which he had obtained from selling the canning company. The last of that stock was sold in September of 1976, at the request of the banker for Tose, Inc., and the proceeds used to pay a loan which Tose had from the other bank, originally for one year, in 1969.

Tose attempted to sell the Eagles for $20,000,000 in 1976, but the proposed purchaser, after conducting an investigation, expressed the view that the Eagles were worth less than $15,000,000. By reason of various obligations which Tose had incurred on the strength of owning a controlling interest in the Eagles, sale of the Eagles for $15,000,000 would have netted Tose only $1,000,000. On the other hand, *for tax purposes*, a sale of the Eagles for $15,000,000 would have produced a paper profit of $25,000,000 (i.e., the difference between the purchase price and the Eagles' negative book value), and Tose had no resources to meet the very substantial personal tax liability which he would have sustained as a consequence of the sale.

Tose's sources of earned income during 1976 were Tose, Inc., where he spent only 5 hours a week and retained a right to draw a salary of $50,000 per year, and

the Eagles, from which he could draw no more than $60,000 in salary and expenses combined unless the Eagles earned a profit before depreciation, in which event Tose was entitled to receive 50% of the profits up to $200,000. From these sources of income, Tose was obliged to pay wife support at the rate of $100,000 a year through 1976, was spending $100,000 to $150,000 a year to operate a helicopter, and was required to make principal and interest payments of $40,000 a year on his home and $18,000 a year on property leased to the trucking company.

When Tose had no more liquid assets to sell, he borrowed. Tose's creditors in 1976 included four banks, a savings and loan association, insurers of Tose's life, the chief operating officers of Tose, Inc., and the general manager of the Eagles. When asked his reason for such borrowings, Tose said he needed the money to live in a style to which he had become accustomed. He wanted to live "graciously". At the time, he owned not only the helicopter, but a Mercedes and a Rolls-Royce.

The Credit Record of Tose and the Eagles With FPB Through 1975

The Eagles, whose operations and depreciation deductions had generated substantial cash to reduce their obligations to FPB through 1973, were not able to make a principal payment of $750,000 due FPB in 1974.

On November 1, 1975, Tose, the Eagles, and FPB, following negotiations initiated on behalf of Tose and the Eagles by Forstater, executed an amendment to the Eagles loan agreement. Besides changing the amortization schedule for the loan to omit the $750,000 principal payment which the Eagles had failed to make in 1974, the amendment increased Tose's salary and expenses from $35,000 to the substantially higher levels set forth above. Another accommodation extended to Tose and the Eagles by FPB at that time included substitution for a working capital requirement, as to which the Eagles had persistently been in default, a requirement that the Eagles earn

a profit of not less than $1.00 on an annual basis for each year.

Because of the provision increasing Tose's right to be compensated by the Eagles, FPB required that Tose obtain consents to the amendment to the revised loan agreement from all of his limited partners. Tose obtained consents from two partners, including Mr. Barness, but he did not obtain a consent from the third, John Firestone. Tose secured the new accommodation with FPB by representing, through Forstater, that Firestone was no longer a partner, when this, in fact, was not so.

Forstater and His Relationship With Tose and the Eagles

As stated above, respondent Forstater was employed full time as the chief financial officer of Tose, Inc. and the Eagles through the spring of 1976. Even as an independent financial consultant for Tose and the Eagles, Forstater earned $125,000 during 1976 alone. Between 1969 and 1977, Forstater assisted Tose in a long series of negotiations and litigations, including lawsuits with the previous owner of the Eagles, the former stockholders of the canning company he had sold, the disappointed Eagles' investors, Tose's second wife, United Parcel Service and Ford Motor Company.[6] Tose named Forstater as Executor under his Will and Trustee under a Trust Agreement for Tose's children dated January 9, 1975. Forstater's duties in the connection would have included collecting all insurance on Tose's life, holding Tose's investments in all of his various corporations, including Tose, Inc., and serving as general partner of the Eagles. In that connection, Tose's Trust Agreement stated: "*** Settlor has complete confidence that Forstater has the abilities to successfully assume such responsibilities."

6. Publicity adverse to Tose associated with certain of those lawsuits, as well as with Tose's later disputes with Messrs. Barness and Firestone, were extensive and well known in the banking community at the time of the events complained of by petitioners.

Herbert Barness and John Firestone

Until the summer of 1976, Barness was Tose's closest friend. It was Barness who made it possible for Tose to acquire the Eagles after they had been first offered to Barness by the former owner, who was also a friend of Barness. Barness acquired the 29% limited partnership interest in the Eagles which he owned as of the times complained of by capitalizing loans to Tose which he made: (a) to enable Tose to conclude his purchase of the Eagles in 1969, and (b) to enable Tose to purchase a limited partnership interest from a fifth of the original investors in 1972. At that time, Tose and Barness first executed an agreement by which each committed himself to purchase at cost the other's interest in the Eagles in the event of the other's death, retirement, bankruptcy or incompetency. In June of 1976, that agreement was replaced by another pursuant to which Tose and Barness each gave the other a right of first refusal on his interest in the Eagles if the same were offered for sale.

As the court of appeals noted (P-App. 8-9), "Relations among the partners became strained in 1976. Barness began openly criticizing Tose's management of the Eagles and demanded access to the Club's financial records" and wrote Tose in September, 1976, accusing him of "taking advantage *** of me and your other partners." The court of appeals did not state the reasons for Barness' actions, but they were substantial, bona fide, and established by uncontradicted testimony. The reasons for John Firestone's unhappiness with Tose were just as appropriate and well documented and uncontradicted.

Barness began threatening Tose with suit in the fall of 1976 and Firestone actually instituted suit in June of 1977. After Tose abandoned efforts to obtain funds from FPB to settle with Barness and Firestone, each of them continued the course on which he was embarked before Tose sought FPB's assistance. In the fall of 1977, Barness filed suits which provided him with access to Eagle financial records and an injunction against improper with-

drawals from the Eagles by Tose. Thereafter, Tose bought Barness' interest in the Eagles.

Eventually, Tose paid what he owed Firestone for Firestone's interest in the Eagles. He then settled Firestone's law suit by paying Firestone's counsel $55,000.

Tose's Dealings With FPB During 1977

Early in 1977, the Eagles' outside auditors, in performing their year end audit, concluded that Tose owed the Eagles $140,000 for overdraws in 1976 and $25,000 for unauthorized expenses charged to the Eagles during 1975. At this point, Tose borrowed $1 Million from an overseas principal, transferred $200,000 to the Eagles, used $100,000 to repay a loan which he had made from Barness in the spring of 1976, and used other sums to pay other creditors. However, this loan was repayable in 11 months and was secured by a pledge of Tose's interest in the Eagles, i.e. the same asset which was the primary security for FPB's loan.

The Hayes memorandum of March 24, 1977, of which petitioners have always endeavored to make so much, was not, and did not purport to be, a "plan to squeeze out Tose in favor of Barness." This the Court can readily determine by examining that document and its predecessor, a Hayes memorandum of March 17, 1977, copies of both of which are included in this Appendix (R-App. B-1 to C-6).

The Hayes memoranda originated under the following circumstances. In March of 1977, the Eagles' auditors notified the Eagles that they could not complete their financial report for 1976 unless FPB waived eight defaults under FPB's loan agreement. Instead of making a profit, the Eagles had lost $1.2 Million during 1976; only $115,000 of that loss was attributable to depreciation, and the loss increased the Eagles' working capital deficiency by $826,000. The Eagles had not filed a budget for 1976 nor interim financial statements for 1977. Tose had overdrawn his own account in 1976 and 1975, as noted above,

and excessive amounts had been spent for additions to capital assets and player compensation even though new, and upward revisions of these limitations had been agreed to by FPB at the request of the Eagles in November of 1975.

The accountants' refusal to certify the Eagles financial statements caused Tose to send Forstater to confer with FPB's loan officer, Hayes, on March 16, 1977 in an effort to persuade FPB to waive the defaults. The loan agreement between the Eagles and Tose on the one hand and FPB on the other specifically required that the Eagles "maintain management satisfactory to the bank." After Hayes met with Forstater and reviewed a draft of the accountants' report, Hayes, on his own and without consulting anyone else, wrote his memorandum of March 17, 1977 (R-App. B-1-5). Hayes' recommendation was that, as a condition precedent to *continuing* the Eagles relationship with FPB, Tose be required to give up financial control and, possibly, the position of chief executive officer of the Eagles. Hayes' recommendations in this regard, as is apparent from the face of his memorandum, stemmed from the fact that the Eagles were in default in the loan agreement in the respects suggested by the accountants, that Tose's limited partners were threatening him with court action, and that FPB had the right to demand the changes in management under the provisions of the loan agreement. Hayes testified, without contradiction, that conditions such as this are common in loan agreements of this type, that FPB had had occasion to enforce them with respect to other borrowers, and that those borrowers had cooperated.

Hayes' memorandum of March 24, 1977 (R. App. C-1-6), resulted from an intervening meeting with Hayes and his superiors, including respondent Bunting. At that meeting, Bunting objected to Hayes' suggestion that Forstater be appointed to serve as the Eagles chief financial officer or possibly chief executive officer on the ground that "Forstater was too close to Tose." Bunting also suggested that Hayes confer with Schnader, Harrison, Segal & Lewis,

Esquires, the attorneys by whom FPB had been guided from the inception of its dealings with Tose and the Eagles. (That law firm had dealt with the previous owner of the Eagles when he encountered financial difficulties and the bank which financed him attempted to collect its loan by causing a sale of the Eagles franchise.)

The Schnader attorneys predicted that Tose would reject, initially at least, a demand for surrender of financial control and recommended that Hayes involve the Commissioner of the NFL in any steps which the Bank proposed to take since, ultimately, a change in the Eagles management, as well as the sale of their franchise, would require League approval. Accordingly, Hayes' March 24th memorandum not only repeated Hayes' recommendation of March 17th that a change in the Eagles' management be requested as a condition for continued FPB financing, and the reasons for that recommendation, but set forth a series of steps which Hayes recommended FPB take if, as Hayes anticipated, Tose rejected initially the Bank's request for a change in management and could not secure alternative financing elsewhere. This portion of Hayes' memorandum contemplated that Barness as well as the Commissioner of the NFL would be notified of what was occurring because Barness owned a 29% interest in the Eagles, and Hayes believed that Barness could, on the basis of his own knowledge of how Tose had been operating the Eagles, lend credibility to the Bank's request that the NFL agree to a change in the Eagles financial management. While Hayes projected that it might be necessary to threaten to seek an involuntary sale of the Eagles if Tose did not cooperate, this was an event which Hayes desired to avoid, and believed the NFL would also.

Two more points should be made concerning the Hayes memoranda. They were internal documents only, and there is no evidence whatever that any individual outside FPB saw them at the time or that the subject matter was even discussed with any of the other alleged co-conspir-

ators. More important still, according to the testimony of everyone involved, Hayes' recommendations were rejected as too harsh by Hayes' superiors, respondents Bunting and Pemberton. Instead, as the court of appeals noted (P-App. 12), "Bunting and FPB *** took a gentler approach." Bunting met with Tose and recommended that Tose either agree to tighter financial control or consider finding another lender, to which Tose responded that he would welcome tighter controls but desired FPB to advance additional sums to enable him to buy out Messrs. Barness and Firestone. As the court of appeals also stated (P-App. 12), this led to an agreement in principle pursuant to which FPB would waive the existing defaults under the loan agreement and lend the Eagles up to $5.5 Million to buy out limited partners in reliance on Tose's professed willingness to agree to tighter financial controls which, however, at least at that point, were not yet defined.

The court of appeals opinion also states that the agreement was never implemented (R-App. 12), but it does not make clear that the failure to implement the agreement was in no way the fault of FPB. Specifically, between April 18 and July 22, 1977, FPB took a series of steps whose objects were (a) to lend the Eagles up to $5 Million so that the Eagles could, among other things, acquire the Barness interest, settle with Firestone, repay the $1 Million loan which Tose had made in February of 1977, and repay sums which Tose himself had already advanced to acquire the Firestone interest; (b) to effect various economies in the Eagles operations, some by terminating certain personnel; (c) to control Tose's ability to unilaterally withdraw money by requiring co-signatures on all Eagle checks, and (d) to have the Eagles install Forstater as chief financial officer with authority to review, and pass upon in advance, all significant financial decisions.

The evidence is equally clear in establishing that, except for arranging for co-signatures on all Eagles checks drawn by Tose after June 15, 1977, none of the objectives which FPB was attempting to achieve during this period

was achieved, and that the sole reason for this was a decision on the part of Tose, on the recommendation of his counsel, to accept no new financing; to refrain from settling with Firestone; to conclude no contract with Forstater, and to terminate no Eagle personnel unless and until arrangements could be concluded to buy out Barness on terms satisfactory to Tose.

In the meantime, FPB's review of Eagle records showed that, during the first five months of 1977, Tose had not only withdrawn from or charged to the Eagles $20,000 more than he would have been entitled to withdraw or charge for a full year, unless the Eagles had a favorable cash flow, but those expenses included many substantial charges made by Tose and a friend for items entirely unrelated to Eagles business, with the friend's charges having been made on an Eagles credit card issued to the friend by Tose. This was so even though the FPB's loan agreement stated specifically that only "*** expenses properly charged in connection with the business of the Club may be charged to the Club."

The Meeting of July 28, 1977, and Its Background

Petitioners' own evidence also showed that the meeting of July 28, 1977, which led, finally, to the installation of Forstater, was preceded by a meeting on July 7th in which respondent Pemberton told Tose that FPB was not satisfied with the cooperation which it had received from Tose and his staff and that, if Tose did not keep his side of the bargain, discussions concerning an increased loan would have to be terminated.

The immediate cause of the letter of July 22 by which Tose was advised that FPB was no longer considering increasing the loan, and of the meeting of July 28, 1977, was Tose's refusal to meet again with the Bank's officials on July 19, 1977. On that day, Tose and his counsel had determined to abandon the negotiations which they had been conducting to buy out Barness and to resume contacting other sources of financing to replace FPB. After

Tose refused to come to that meeting, an FPB official informed Forstater, who in turn informed Tose's lawyer, that unless Tose came to another meeting, the Bank would not lend the Eagles money which the Eagles needed to meet a payroll.[7]

At various times in the past, petitioners have stated that FPB officials were advised by their outside counsel previous to the July 28th meeting that there was no basis for calling the Eagles loan at that time. These assertions are not supported by the record. What the record actually shows is that, previous to the meeting, because FPB had waived the earlier defaults, the Bank's attorneys told Hayes that the defaults which existed in July were less serious than those which had been waived; that some of the new defaults were purely technical; and that the Eagles would certainly be seriously in default by October, 1977, when, because they had used $500,000 of advance ticket receipts to make the June, 1977, principal payment on their loan, the Eagles would not have funds to pay visiting teams their 40% of such receipts. There was never testimony that FPB's counsel opined before the July 28th meeting that the defaults which existed—particularly the failure to maintain management satisfactory to the Bank—could not be a basis for calling the loan. As a matter of fact, FPB's counsel drafted a letter listing the various defaults which was sent to Tose on July 27th.

The court of appeals' opinion (P-App. 14-15) includes a substantially accurate summary of Tose's version of what happened at the July 28, 1977 meeting. However, in deciding whether to grant certiorari, this Court should

7. In June, 1977, FPB had permitted the Eagles to use the proceeds of advance ticket sales to make a principal payment of $750,000 on FPB's loan and to pay down temporarily, by an additional $1,250,000, the balance due on that obligation, and thereby save interest. FPB also agreed to lend back the $1,250,000 when requested, but that agreement was directly and specifically contingent upon the Eagles not being in default under the loan agreement when requests for the loan were made.

also be aware that Tose's testimony that Bunting said then, "I'll make sure that you don't get financing from any bank in the City of Philadelphia *** (or) any bank in the country," was contradicted not only by respondents Bunting and Pemberton, but by Tose's own lawyer, and by statements which Tose made to reporters from three Philadelphia newspapers on August 10, 1977. What Tose said then, and what everyone else present said at trial was that, at the July 28th meeting, Bunting said, in substance, that he would not grant Tose time to secure other financing as an alternative to installing Forstater because *Bunting believed* Tose would not be able to secure other financing in Philadelphia, and that he *might not* be able to get it anywhere in the United States. Such a statement would certainly have been appropriate in view of the then current financial condition of Tose, the Eagles, and Tose, Inc., and Tose's general credit background.

FPB's Contacts With Other Banks

Contrary to another of petitioners' assertions, there was no evidence that any other bank respondent had any contact with FPB in which FPB actively or passively attempted to persuade that bank not to extend credit to Tose or the Eagles, and both the district judge (R-App. A-9) and the court of appeals so concluded (P-App. 29).

Obviously, Mr. Bunting's communication with Citibank in December, 1977, was not complimentary to Tose; however, the facts stated were substantially accurate, and the statements were made in a context in which Citibank made a credit inquiry, and Mr. Bunting was obliged to respond, and legally privileged to be frank, since Citibank and FPB had extensive financial dealings with each other and Citibank was considering making loans to Tose and the Eagles. Furthermore, notwithstanding Mr. Bunting's comment, Citibank did loan funds to Tose and the Eagles.

REASONS FOR DENYING THE WRIT

Rule 17 of this Court provides:

> "A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor."

The Rule goes on to describe "the character of the reasons" the Court will consider in passing on a petition for certiorari, such as: (1) conflicts in decisions between federal courts of appeal on the same issue; (2) wide departures by a federal court of appeals from the "accepted and usual course of judicial proceedings," and (3) a decision by the federal court of appeals on an important question of federal law which has not been, but should be, settled by this Court," or which "has decided a federal question in a way in conflict with applicable decisions of this Court."

When measured by the foregoing standards, the defects of the present Petition are both clear and fatal.

I. The Alleged Conspiracy to Force a Sale of Tose's Interest

The court of appeals considered first the sufficiency of petitioners' evidence concerning the alleged conspiracy between the First Pennsylvania respondents, respondent Forstater, and Messrs. Barness and Firestone to force Tose to sell his controlling interest in the Eagles to Mr. Barness.

Actually, petitioners produced no evidence that the First Pennsylvania respondents were a party to any such scheme. The evidence clearly shows that all that FPB ever proposed to do, and all that it ever did do, was, for reasons which were more than ample, and after affording Tose more than four months to obtain credit accommodations elsewhere, require that Tose place Forstater in charge of the financial management of the Eagles if the Eagles were to continue to obtain their credit from FPB. However,

even if, as petitioners contend, the purpose of the actions complained of was to force Tose to sell his general partnership interest in the Eagles, and even if this would have meant a sale of that interest to Barness by reason of Barness' having a right of first refusal, there is neither factual nor legal basis for questioning the propriety of the court of appeals' conclusion that plaintiffs failed to demonstrate that what FPB actually did, or was alleged to have conspired to do, unreasonably restrained trade in any revelent market place, or that it would have been either appropriate or justified for the court of appeals to hold "on this record that those who engage in a struggle for partnership control of one entity are [per se] competitors for the purposes of the Sherman Act" (P-App. 26-27).

The court's conclusions in this regard are not inconsistent with any holding of any other court of appeals, and they are directly consistent with the principles applied in *Bucher v. Shumway,* 452 F. Supp. 1288, 1289 (S. D. N. Y. 1978); *In Re Transocean Tender Offer Securities Litigation,* 427 F. Supp. 1208, 1210 (N. D. Ill. 1977), and *Passerieux v. Time, Inc.,* 1974-2 Trade Cases ¶ 75,258 (S. D. N. Y. 1974). See also *Bosse v. Crowell, Collier & MacMillan,* 565 F. 2d 602 (9th Cir. 1977); *Wobb v. Ford Motor Co.,* 76 F. R. D. 452 (W. D. Pa. 1975), *aff'd,* 546 F. 2d 421 (3d Cir.), *appeal dismissed,* 430 U. S. 923 (1977); *Deaktor v. Fox Grocery Co.,* 332 F. Supp. 536 (W. D. Pa. 1971), *aff'd,* 475 F. 2d 1112 (3d Cir.), *cert. denied,* 414 U. S. 867 (1973); *Madison Fund, Inc. v. Charter Co.,* 406 F. Supp. 749, 751 (S. D. N. Y. 1975), and *National Supply Co. v. Hillman,* 57 F. Supp. 4 (W. D. Pa. 1944).

Petitioners argue (Petition p. 17) that "certain language of this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477 (1977), is being distorted to nullify *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U. S. 207 (1959)." *Klor's* stands for the proposition that a single merchant has standing to sue under the antitrust laws if the proven conduct, which in *Klor's* was a group boycott by the principal manufacturers of electric appli-

ances, is anticompetitive in nature. Also distinguisable without difficulty is *Poller v. CBS, Inc.*, 368 U. S. 464 (1962), which involved an alleged conspiracy led by a nationwide broadcasting company to destroy UHF broadcasting throughout the United States and, in particular, to eliminate it as a factor in the Milwaukee market. *Catalano, Inc. v. Target Sales, Inc.*, 446 U. S. 643 (1980), involved an alleged agreement among competing beer wholesalers to fix the terms of credit on which they would sell to beer retailers. *Radovich v. National Football League*, 352 U. S. 445 (1957), involved an alleged conspiracy by all members of the National Football League to destroy a competitive football league in which the plaintiff once played and, pursuant to such an alleged agreement, boycotting the plaintiff and preventing him from becoming a player coach.

The court of appeals here, like this Court in *Brunswick Corp.*, properly held that the anti-trust laws were intended to protect competition in a relevant market place, and not competition per se, and that petitioners failed to meet their burden of proving either anticompetitive intent or impact, both essential elements of an antitrust claim (P-App. 27).

II. The Alleged Conspiracy to Deny Credit

Both the district court (R-App. A-7) and the court of appeals, (P-App. 28), after carefully reviewing the evidence, concluded that, "*** FPB was not shown to be a participant in interference with the credit market."

The district judge concluded as a matter of law (R-App. A-3-5, A-10-11), and the jury concluded as a matter of fact after a trial which the court of appeals determined was free of error (P-App. 41-42), that petitioners' charges as to respondent Forstater, i.e. that he was a disloyal employee who conspired against petitioners, were not supported by the evidence.

The trial judge also held, after reviewing the evidence, that petitioners failed to establish that the FPB respond-

ents acted with respect to petitioners as a result of a conspiracy with either Barness or Forstater, rather than for FPB's own independent reasons (R-App. A-9). While the court of appeals did not decide that question in that context, it did conclude, in the context of its analysis of petitioners' claim under the Bank Holding Company Act, that, "There is no evidence that Tose's ouster in favor of Barness was made a condition or requirement of a loan to the Eagles or to Tose" (P-App. 38), and petitioners' allegation to the contrary was the heart of their allegations of a Sherman Act conspiracy involving the First Pennsylvania respondents and Barness.

While petitioners claim that, "*** there is substantial inter-circuit and intra-circuit conflict" on the Sherman Act issues in this case (Petition P. 17), they have cited no conflict between the Third Circuit's opinion in this case and any other decision of that circuit or of any other circuit, although Rule 17 clearly imposes that burden on petitioners.

There is no dispute whatever concerning the appropriate legal standard which district courts and courts of appeal should apply in passing on motions for summary judgment or for a directed verdict in a Sherman Act conspiracy case, and the court of appeals cited that standard, as set forth in recent decisions of this Court and in its own decisions, very early in its opinion (P-App. 7-8). What petitioners seek is to have this Court grant review solely for the purpose of determining whether the court of appeals properly applied what are admittedly the appropriate standards to the complicated factual situation presented by the evidence. In *Magnum Import Co. v. Coty*, 262 U. S. 159, 163 (1923), cited in Stern & Gressman, *Supreme Court Practice*, 4th Ed. (1969), Chief Justice Taft stated: "*** the jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

III. The Bank Holding Company Act Claim

Petitioners' claim under the Bank Holding Company Act was based on the following provision of that statute (12 U. S. C. § 1972(1)):

> "A bank shall not in any manner extend credit *** on the condition or requirement *** (C) that the customer provide some additional property, or service to such bank, other than those relating to and usually provided in connection with the loan ***."

FPB's loan agreement with petitioners required that they "maintain management satisfactory to the bank", and Mr. Hayes, testifying without contradiction and as a plaintiffs' witness, stated that this was a common provision in loan agreements of this type and one which FPB had invoked with other borrowers in situations in which FPB was concerned about the borrower's management. After reviewing the record, the court of appeals specifically stated that it included "*** no evidence that Tose's ouster in favor of Barness was made a 'condition or requirement' of a loan to the Eagles or to Tose" (P-App. 38). On the other hand, the court stated (P-App. 38):

> "Appellees concede that FPB demanded that Tose relinquish financial control of the Eagles to Forstater as a condition to continuing the loan. In the circumstances of this case, however, we hold as a matter of law that this was not a demand for a 'service *** other than those related to and usually provided in connection the loan.' Imposition of financial controls over the Eagles was directly related to maintaining the security of FPB's substantial investment, and the bank's demand cannot be considered unusual in the face of substantial evidence that it had good reasons to be concerned about the loan."

Petitioners claim (Petition P. 17) that "*** there is substantial inter-circuit and intra-circuit conflict on the

Bank Holding Company Act issues involved in this case." Again, however, petitioners have failed to identify any case in any other circuit with which the Third Circuit's decision in this case is in conflict. Indeed, the holding here agrees with the First Circuit's recent decision in *B. C. Recreational Industries v. First National Bank of Boston,* No. 80-1383, 1980-81 Trade Cases (CCH), ¶ 63,778 (1st Cir. Jan. 30, 1981).

Petitioners also state that this Court has not acted on the 1970 amendments to the Bank Holding Company Act, and that "*** the lower courts are becoming inordinately restrictive about them." There are volumes of statutes upon which this Court has not ruled. That, however, is not an adequate basis for granting a writ of certiorari. Furthermore, petitioners have failed to identify any of the allegedly "inordinately restrictive rulings" of the "lower courts" to which they refer.

CONCLUSION

In the district court, petitioners failed to carry the evidentiary burden which they were required to meet in order to survive respondents' motions for a directed verdict. In the court of appeals, petitioners failed to meet their burden of establishing that the district court had applied erroneous standards, or applied such standards improperly, in granting the motions for a directed verdict. Here, petitioners have failed to carry the burden required to persuade this Court to grant certiorari.

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Excerpts from Bench Opinion of Trial Judge Clifford Scott Green, June 30, 1980, Explaining His Reasons for Directing Verdicts in Favor of Respondents First Pennsylvania Bank, N.A., John R. Bunting, John C. Pemberton, and Sidney Forstater on Petitioners' Sherman Act and Bank Holding Company Act Claims.

[19.3]

* * *

As you know, there are presently pending before the Court motions filed on behalf of all defendants for directed verdicts pursuant to Rule 50A of the Rules of Civil Procedure. I have heretofore granted summary judgment in favor of Girard Bank and Chase Manhattan Bank as to the banking boycott conspiracy charge and in favor of course of all defendants on the interest fixing charges, so these matters are not now before me.

In deciding the motions, I view the evidence and all reasonable inferences falling therefrom in the light most favorable to the plaintiffs.

Count I of the complaint charges violations of the Sherman Act in that it's alleged that the parties defendant collaborated in a plan to force a distress

[19.4]

sale of Mr. Tose's interest [in] the Eagles to Mr. Barness.

After careful review of all the evidence, I find that the evidence and the reasonable inferences therefrom viewed in the light most favorable to the plaintiffs do not support the conspiracy charges and the other charges set forth in the complaint.

Accordingly, I grant the motion of all defendants for a directed verdict.

I base this decision on the following view of the evidence.

First, the evidence is insufficient to establish the conspiracy alleged and sought to be proved. I've considered all of the evidence submitted in reaching this conclusion.

While there is direct evidence by way of denial by all of the alleged co-conspirators, that they participated in any conspiracy, and while there is—there are business explanations offered by all of the defendants in this matter, there is no direct evidence, of course, of a conspiracy. There is direct evidence which [if] believed by a jury would support a verdict in favor of defendants; however, a conspiracy may be established entirely by circumstantial evidence and, of course, the law makes no distinction between

[19.5]

direct and circumstantial evidence.

Thus, I have carefully reviewed the evidence to determine if a jury could reasonably infer from the evidence the conspiracy alleged. I feel the evidence totally is inadequate to permit such an inference. The evidence does establish that at various times Mr. Tose and the Eagles were involved in several separate disputes with the partners, Firestone and Barness, and with its bank, First Pennsylvania Bank. However, there is no evidence to tie these separate disputes into the complaint of conspiracy.

[19.6]

Looking at the parties individually, and turning first to Mr. Forstater, it is clear that the evidence establishes that he was the chief financial officer of the Eagles since 1969, and that testimony is supplied by Mr. Tose himself, that in May of 1977 Mr. Tose raised his salary to at least $100,000 plus certain fringe benefits and he continued [him] as chief financial officer.

This fact—there was, in fact, an agreement signed, signed by at least Mr. Tose, which would have hired Mr.

Forstater by virtue of that written agreement and given him the authority of chief financial officer.

However, this fact was never disclosed either to Mr. Forstater or to the bank, First Pennsylvania Bank. And this fact is established by the testimony of Mr. Tose.

Next, Mr. Rome has testified that at the meeting attended by Mr. Forstater and Mr. Rome that Mr. Forstater had acted pursuant to authority in discussing the finances of the Eagles with First Pennsylvania Bank. And that, in fact, as Mr. Rome has stated [~~that~~] Mr. Forstater advanced the [cause] of the plaintiff against the interest of the bank.

On July 29th, it is clear that the

[19.7]

bank read to Mr. Tose the statement which had the effect of putting Mr. Forstater in, [~~as~~] with authority as chief financial officer and chief executive officer, [but] with the title of chief financial officer.

It is clear that on July 29th Mr. Tose had instructed both Mr. Murray and Mr. Vermeil to go along with this, to pretend that this step was being taken in good faith, that he was agreeing in good faith and to go along with it.

There is no evidence to show that Mr. Forstater knew at any time that he acted as chief executive officer, that it was against Mr. Tose's wishes. If Mr. Forstater acted after July 29th, as if, he, in fact, had authority of a chief executive officer, it is because of Mr. Tose's misleading of Mr. Forstater in this regard.

I note however that there does not appear to be any action on behalf of Mr. Forstater other than one which was a throwing of a check regarding Mr. Kuharick or a conversation with Mr. Saleno which I accept as having occurred, as I must accept in determining this motion, that these are the only acts on behalf of Mr. Forstater which would suggest that he actually exercised the authority of chief executive officer. I note also that in that regard

[19.8]

that Mr. Forstater was overruled at least in regard to the Kuharick matter by the First Pennsylvania Bank.

I note also that the evidence clearly discloses that Mr. Forstater was the named fiduciary in the will of Mr. Tose, that Mr. Tose had raised his salary to $100,000 plus the fringe benefits.

On this evidence I do not believe the jury can find any motivation for Mr. Forstater to join a conspiracy against Mr. Tose.

At least, there is no evidence from which a jury could so find. Additionally, Mr. Forstater has taken the witness stand, has been called as an adverse witness as did all the defendants and plaintiff has been given maximum leeway in the cross-examination of Mr. Forstater. Mr. Forstater has denied any conspiratorial intention and I note that even if a jury did not believe Mr. Forstater's denial, that the jury would not be free from not believing the denial to find from that denial that, in fact, a conspiracy existed.

Finally, and probably the most significant piece of testimony or evidence relied upon plaintiffs is that of a memorandum written by Mr. Hayes. It is clear that standing alone that

[19.9]

memorandum is not evidence against Mr. Forstater because it is an out of court assertion by Mr. Hayes. But when considered in relation to Mr. Hayes' testimony in this court, it is clear to the Court that if Mr. Hayes' testimony is read in meaningful context, then it is clear that the discussions that Mr. Hayes had with Mr. Forstater were, as Mr. Hayes acting as a representative of the bank, questioning Mr. Forstater who both parties believed had the authority to act and to discuss matters on behalf of Mr. Tose and the Eagles.

Based on this evidence, as against Mr. Forstater, it is clear that the jury could not find or draw the inference that Mr. Forstater entered into a conspiracy.

[19.10]

Accordingly, Mr. Forstater's motion as to Count I is granted.

Turning next to Mr. Bunting—first, I note that the evidence reveals that he, too, has taken the witness stand, has testified [~~under adverse~~] as an adverse witness and under cross-examination, [and] has completely denied that he had ever entered into any agreement with anyone to, in any way, affect the interest of Mr. Tose or Mr. Tose or the Eagles.

It's clear that there was a meeting of March 25, 1977, and that meeting followed a report by the Eagles' certified public accountant, Touche Ross, that they would not—could not certify the Eagles' financial statement for 1976, unless certain waivers were received from the bank.

The evidence reveals that Mr. Tose and his lawyer attended a meeting at First Pennsylvania headquarters, where they apparently were treated cordially and in response to the bank's request that the Eagles either put their financial house in order or seek financing at some other place, Mr. Tose suggested that the bank grant a new loan to the Eagles, so that, and to Mr. Tose—so that, his limited partners could be brought out and financial controls could indeed be put in place.

[19.11]

Mr. Tose has expressed from the witness stand his pleasure at the outcome of that meeting. Between that meeting and July 28th, it's clear that Mr. Bunting [had] met with Mr. Barness, both in a social meeting and in one regarding the amounts necessary or whether or not Mr. Barness would indeed sell out his interest to Mr. Tose.

Mr. Bunting has described the meeting as to give him sufficient information to go before the Board of Directors and to tell them that the purpose of the loan was to permit a buy out of Mr. Barness. It's clear that as of July

28th, that Mr. Tose had not advised First Pennsylvania Company that he could agree to terms as to a chief financial officer and although he had left such an agreement in escrow with his attorneys, neither his attorneys nor Mr. Tose disclosed this.

It's clear also that as of July 28th, Mr. Tose had not been able to reach any agreement with Mr. Barness as to a payout figure or the terms [on which] Mr. Barness [would] relinquish[~~ing~~] both his interest in the Eagles and his right of first refusal.

It's clear in considering the charges against Mr. Bunting that Mr. Bunting has made complete denials of the charges and it's clear that while the

[19.12]

jury once again may disbelieve Mr. Bunting and his explanation of his meetings with Mr. Barness, that in view of both Mr. Bunting's and Mr. Barness' denial, that [as to] any agreement concerning the Tose matter and the Eagles was discussed or any agreement reached—there is not evidence from that denial which would support a finding of conspiracy.

It's clear that on July 28th, that an alternative was given to Mr. Tose.

The first alternative was to make Mr. Forstater the chief executive officer by 9:00 the next morning.

The second alternative, if he declined, that was that the Eagles—was that the First Pennsylvania Company would not relend to the Eagles the ticket money which the Eagles had used to reduce their loan and that the result of not making the new loan would be that the checks of the Eagles would bounce.

It's clear that—and I accept Mr. Rome's statement and Mr. Tose's—by Mr. Tose's statements, that threats were made by Mr. Bunting, that he would see that the Eagles did not obtain financing either locally or elsewhere. However, whatever Mr. Bunting said on July 28th, it's clear that

[19.13]

whatever threat was made on that day, that it was not carried out. It was not carried out, first, because Mr. Rome after discussion with Mr. Tose elected to proceed with the first alternative, the appointment of Mr. Forstater as chief executive officer.

Perhaps, the most eloquent statement as to the beliefs of the parties as to the status of this matter on July 29th, was that the First Pennsylvania Bank [~~stated~~ ~~that~~] with the installing of Mr. Forstater as chief executive officer, [~~and~~] there is no dispute that they went ahead and made new loans, not only to the Eagles, but to Mr. Tose.

This certainly is probative that First Pennsylvania Bank believed the agreements to be intact and it's an objective demonstration by Mr. Tose that he believed the same.

It's true that Mr. Bunting has answered certain credit inquiries and a jury might find that the answer to the credit inquiries was not favorable and perhaps even inappropriate.

In any event, though, the credit inquiries went to Mr. Bunting as an individual officer of First Pennsylvania Bank, and there is no inference that can be drawn that his answering of those inquiries was connected with any type of conspiracy.

[19.14]

Accordingly, there's no evidence from which a jury could find that Mr. Bunting entered into a conspiracy with the other alleged conspirators and, therefore, the motion as to Mr. Bunting as to Count I, charging conspiracy, is denied—is granted, I'm sorry.

Turning next to Mr. Pemberton—except for the alleged call by Mr. Pemberton to Citibank of which there is no evidence of what was said—there is no evidence of any conduct on his part which would even permit a jury to speculate that he participated in a conspiracy. The testi-

mony of all of the witnesses reveals Mr. Pemberton's actions as being that of the peacemaker, the one who was attempting to help the Eagles to work out their problems, the one who told the Eagles that if they had credit problems—Mr. Bunting said he would answer credit inquiries truthfully, Mr. Pemberton volunteered to answer, and what all parties believed to be that Mr. Pemberton would answer in a more favorable manner.

Now, it's true that Mr. Pemberton—and I accept Coach Vermeil's testimony in this regard, that Mr. Pemberton arrived at the Eagles' office and stated that if Mr. Vermeil did not corporate, that he would blow the ship out of the water, or some such

[19.15]

similar statement. I find that this is insufficient to permit a finding of conspiracy when it's viewed in the light of Mr. Tose's misleading and deliberately misleading conduct in trying to mislead First Pennsylvania Bank and Forstater into believing that he supported the action of placing Mr. Forstater in charge.

[19.16]

Had Mr. Tose's actions at that time been sincere, there was every right for the bank to say that it intended to see that the agreement entered into with Mr. Tose was carried out.

It would seem that Mr. Tose did not complain about his own kind of misleading both Mr. Forstater and the bank.

* * *

[19.18]

* * *

There is evidence of passing exchanges by friends, Mr. Dorrance and Mr. Pemberton. But my

[19.19]

view of the evidence and of the law is that such passing exchanges are not, without more, [of] probative value . . . .

There is also evidence that there were meetings of the clearinghouse committee in that the clearinghouses had served no particularly useful function at this time.

However, the evidence concerning those meetings is clear. The minutes do not reveal that there was any discussion at all about the Tose and Eagles matter and First Pennsylvania Company and the parties who were present who had been asked about this has denied that there was any such discussion.

• • •

[19.20]

• • •

. . . There is no evidence that any of the defendants acted other than in their own financial interest or that any of the present defendants had any motivation to aid Mr. Barness in the conspiracy to gain control of the Eagles from Mr. Barness.

Basically the plaintiffs rely upon the testimony of the adverse witnesses to make out their case. And it is clear they have failed to obtain from any of the adverse witnesses any admission favorable to plaintiff.

The Court of Appeals has said in Venzie that while a jury is free to disregard a defendant's

[19.21]

testimony, that no agreement of any kind was formulated during the course of the contact, mere disbelief could not rise to the level of positive proof of agreement to sustain a plaintiff's burden of proving conspiracy.

Accordingly, the Court finds that as to all the defendants there is no evidence of a conspiracy and that the motion for directed verdict must be granted as to count one.

Count two alleges that First Pennsylvania Bank, Mr. Bunting and Mr. Pemberton violated provisions of the Bank Holding Company Act which provides that a bank is prohibited from requiring that the customer provide some additional customer property or service to such bank other than those related and usually provided in connection with the loan discount or trust service.

The First Pennsylvania Bank, it is alleged in a pleading filed in this matter, that the Bank Holding Company Act was violated in the following regards:

That First Pennsylvania Bank, Bunting and Pemberton, [conditioned] the loan of money to the Eagles on the forced sale of Tose's interest to Barness. There is no evidence whatsoever that First Pennsylvania made any condition in regard

[19.22]

to the sale of Tose's interest to Barness. Indeed, the evidence is clear that First Pennsylvania Bank advised Mr. Tose that greater financial controls were necessary to keep the loan at First Pennsylvania Bank, or gave [him] the option to look around for other financing. It was Mr. Tose and not First Pennsylvania Bank which suggested that the Eagles be given a new loan and that it be tied to the purchase by Mr. Tose of Mr. Barness' interest. There is no evidence whatsoever that anyone at any time made it a condition that Mr. Tose sell his interest to Mr. Barness.

The second specification is that First Pennsylvania Bank, Bunting and Pemberton conditioned the relending of the Eagles own advance ticket money on the requirement that a known disloyal subordinate be made chief executive officer [under] circumstances where he was engaged with [them] in a plan to [force] a distress sale [of] Tose's interest in the Eagles to Barness.

First my findings in regard to the conspiracy are applicable here and there is no evidence that Mr. Forstater participated in any plan with First Pennsylvania Bank to oust Mr. Tose.

Second, there is no evidence that First

[19.23]

Pennsylvania Bank knew or should have known of any disloyalty on behalf of Mr. Forstater. The testimony of Mr. Rome would seem to bear this out, that at the meetings attended, that at the meeting attended by Mr. Rome and Mr. Forstater, that Mr. Forstater's interest would be on behalf of the Eagles and adverse to that of the First Pennsylvania Bank.

The third specification is that First Pennsylvania Bank, Bunting and Pemberton conditioned lending money to Tose on the requirement that he complete a negotiation with Barness which had escalated his demands and beyond reasonable grounds.

[19.24]

Once again, it was Mr. Tose who put forth the suggestion that the Eagles lend money to buy out Mr. Barness. There is no evidence that the First Pennsylvania Bank defendants did anything in regard to those negotiations which would have forced Mr. Tose or attempt to force Mr. Tose to buy Mr. Barness' interest at an excessive figure.

Accordingly, since the jury cannot find from the evidence the violation of the Bank Holding Company Act, I grant the motion of defendants for directed verdict in that regard.

• • •

[19.28]

The fifth specification is that Barness, Bunting, Pemberton, Firestone and Forstater interfered with the 1975 restated loan agreement between First Pennsylvania Bank and the Eagles. Tose, by causing its premature acceleration for ulterior purposes.

Clearly, the evidence is that the bank did discuss with Mr. Tose the visibility of Mr. Tose seeking finance elsewhere. But the evidence is clear that this was not in

regard to a conspiracy, but in relation to the Touche Ross audit. It's clear that the bank did not in fact accelerate the loan.

In fact, the testimony by Mr. Tose is that on the 29th day of July, that the bank continued to lend money to Mr. Tose and the Eagles. But Mr. Tose surprised the bank by in fact getting the financing and paying the bank off when the bank did not expect to be paid off.

And it's clear that there is no evidence from which a jury could find a premature acceleration of the First Pennsylvania Bank loan.

Accordingly, I grant to defendants that motion under Rule 50a for directed verdict, as to—of the charges of malicious interferenec with contractual and prospective business relationships.

[19.29]

Finally, Count III also charges cause of action in favor of Mr. Tose for emotional distress intentionally or recklessly caused.

The Court of Appeals has recently found in Chuey versus the Eagles in Section 46 in Restatement of Torts is part of the law of Pennsylvania.

• • •

. . . The Court must determine, as a matter of law, whether there is sufficient evidence for reasonable persons to find extreme or outrageous conduct. If the plaintiff has satisfied this threshold evidentiary requirement, the jury must find the facts and make its own characterization.

• • •

[19.31]

• • •

Plaintiff's specifications to bring Mr. Tose within the intentional infliction of emotional distress is that First Pennsylvania Bank, Bunting, Pemberton, Forstater, Bar-

ness and Firestone intentionally inflicted substantial emotional distress on Tose by maliciously placing a disloyal subordinate over him and exposing him to public ridicule as fiscally irresponsible and unstable, and incapable of managing his own affairs.

First, I have already found that there is no evidence from which a jury could find concerted action in this regard. It's looked at as individually as to First Pennsylvania defendants. There is no evidence from which a jury could find that Mr. Forstater was a disloyal subordinate or that First Pennsylvania had any reason to know or to believe that Mr. Forstater was a disloyal subordinate.

As to exposing Mr. Tose to public ridicule, it's clear that the bank had at least arguably the right under its agreement to insist upon management acceptable to the bank and it's clear that the letter complained of—carefully stated that while Mr. Forstater would be chief executive officer and

[19.32]

chief financial officer, his title was to be that of chief financial officer.

There is no evidence, whatsoever, that any of the defendants did in fact make public this fact of change as to Mr. Forstater's duties as chief executive officer and to the extent that it was made public, it was made public by Mr. Tose's own actions in calling a press conference and discussing it.

It's said that there is emotional distress by carrying out the second specification, by carrying out a series of humiliating acts against him during the period of the takeover, from July 29th to August 9th.

My view of the evidence and I believe that the only evidence in the case is that Mr. Salano approached Mr. Forstater and Mr. Forstater said to Mr. Salano that there was no reason to talk to anyone else, that he was interested in Harold Jackson.

I do not see how that particular conversation could be considered a humiliating act within the meaning of the restated provision for emotional distress, intentionally or recklessly inflicted.

There is the other matter of the Kuharick contract, where it's said that Mr. Forstater did not want to honor the Kuharick contract, would not draw

[19.33]

a check and pay Mr. Kuharick the payment then due, that Mr. Tose insisted upon it and that after First Pennsylvania Bank overruled Mr. Forstater, it's—it's disputed by—I accepted Mr. Tose's version that Mr. Forstater came back and threw the check at Mr. Tose and told Mr. Tose to sign it, which Mr. Tose did and sent the check off to Mr. Kuharick.

[19.34]

It would seem to me that looking at the restatement as to what can constitute the intentional infliction of emotional distress, that the throwing up of a check or the throwing of a check to Mr. Tose could hardly come within the specifications necessary to make out the cause of action.

Accordingly, I grant the defendants who are named in this particular document, I grant their motion for directed verdict.

I am now granting the motion for directed verdicts as to all causes of action set forth in Counts 1 through 3. And I previously had granted summary judgment as to Count 4, judgment accordingly will be entered in favor of all the defendants and against the plaintiffs in this particular case.

One other word, I have not mentioned, Tose, Inc., in any of this analysis of the evidence, because in truth there is no evidence as relates to Tose, Inc.

• • •

APPENDIX B

Plaintiffs' Exhibit 18

3/17/77

Cameron S. Clark, Executive Vice President

Gerald A. Hayes, Jr.

Philadelphia Eagles Football Club

Audit

We have just received the financial statements (in draft form) for the fiscal year ended December 31, 1976, from the Eagles. The statements reflect a loss for the year of $802,206 before giving any effect to the NFL settlement of various class action and antitrust suits. This will add approximately $350,000 to the loss for a total loss of $1,152,206. The major cause of the difference between 1975 and 1976 is a $542,774 increase in general team expense, and an increase in pension costs of $347,865 as part of the settlement with the players union. Another impact of the players settlement is an extraordinary pension cost of $192,452 that did not exist in 1975, but is being taken by the Players Association on a retroactive basis to 1974.

The most disturbing thing about the audit, in my mind, is the growth in deferred players compensation. No money has been deposited or annuity created to take care of these obligations. The pattern of the Club in the past has been to spend every cent they have, and this could lead to serious problems if they can't make the payments on this deferred compensation.

Defaults

The Eagles are in default of several covenants of our loan agreement. They are as follows:

1. They have failed to file interim financial statements during the playing season. The reason, in my opinion, is that they had no financial person capable of preparing these statements.
2. They have failed to file a budget for 1977 for the same reason mentioned above.
3. They have violated the covenant on capital asset additions by spending $42,080 against a limit of $25,000.
4. They have failed to earn a profit.

(Page 2—Copy of 3/17/77 Memo)

5. They have violated the covenant on compensation of players by spending $2,758,971 against a covenant of $2,500,000.
6. The General Partner has withdrawn more than the agreement allows. Leonard withdrew $200,383 in 1976, and had already drawn $65,000 in 1977. His maximum draw in an unprofitable year is $60,000. This default has since been cured by a $200,000 equity contribution by Leonard.
7. The General Partner has spent more than allowed on expenses which Touche Ross feels are not connected with the business of the Club. This figure is approximately $25,000 and I'm sure that is conservative.

Aside from the specific defaults listed, the Club has not maintained management satisfactory to the Bank, and in this particular case I would be willing to use that covenant to back up my recommendations.

Recommendation

During the past six months there have been serious disagreements between Leonard Tose and the limited partners. Court action has been threatened and what agree-

ments have been reached have been violated by the General Partner. In light of the loss, internal battles between partners, the condition of the balance sheet, and the general inability of the General Partner and the General Manager to effectively run the Club, I am making the following recommendation:

1. That we deliver to Leonard Tose a list of terms under which we would continue our loan to the Club. If the terms are not accepted we would proceed to call the loan and exercise against our collateral. Under the second option we would give Tose 120 days to sell the Club to another party.

2. The list of terms under which we would continue are as follows:

   —Tose gives up all control of the financial aspects of the Club to include contract negotiations, team expenses, scouting, publicity and training expenses.

   —Tose agrees to remove his name as an authorized signer of checks.

   (Page 3—Copy of 3/17/77 Memo)

   —That a chief executive officer be appointed who would have complete decision making power over the Club, and that CEO would be either Sidney Forstater or another person that would be acceptable to the Bank.

   —That the salary of Tose be dispersed by a new chief executive officer.

I feel that this plan would satisfy the Bank and the Limited partners of the Club.

GAH:dw

cc: Joseph T. Drennan
Stuart B. Andrews

	FYE 12/31/75 Gold & Gold	*FYE 12/31/76 Touche Ross*
Current Assets		
Cash	432,767	401,444
Accounts Receivable	545,002	284,668
Receivables from Employees	11,008	22,497
Receivable from Leonard Tose	—	140,383
Other Receivables	17,084	102,888
Notes Rec.—New Franchises	106,403	113,156
Prepaid Expenses	24,053	26,428
Current Assets	1,136,323	1,091,464
Property & Equipment (Net)	158,809	168,914
Notes Receivable—New Franchises	569,838	456,682
Deferred Charges	273,000	218,400
Investments	40,400	40,400
NFL Franchise	50,000	50,000
Deferred Debt Expense	16,342	11,563
Purchased Player Contract	—	71,250
Other	24,138	15,927
Total Assets	2,268,850	2,124,600
Current Liabilities		
Accounts Payable	25,678	370,736
Accrued Expenses & Taxes	20,850	164,726
Pensions Payable	—	306,102
Judgement Payable (Choy)	—	115,000
Accrued Salaries	1,100,610	673,846
N/P—First Pa.—Curr.	650,313	500,000
N/P—Deferred Compensat.	—	387,134
Advance Receipts	8,725	—
Current Liabilities	1,806,176	2,517,544
Long Term Debt		
N/P—First Pa.	6,849,687	6,349,687
N/P—Deferred Compensat.	210,978	465,114
N/P—Bert Bell Retir. Plan	—	192,452
Long Term Debt	7,060,665	7,007,253
Partner's Deficit	(6,597,991)	(7,400,197)
Total Liab. & Deficit	2,268,850	2,124,600

	FYE 12/31/75	*FYE 12/31/76*
Revenues:		
Admissions	6,011,560	5,841,459
Radio and Television	2,452,661	2,320,700
Program and Yearbook	32,587	36,191
Interest Income	157,981	137,546
Post Season Games	210,614	298,427
Other	63,750	144,574
Total Revenue	8,928,553	8,778,897
Expenses:		
General Team	2,996,215	3,538,989
Game Expenses	2,451,134	2,357,427
Administrative Expenses	1,056,481	1,185,860
Interest	767,588	635,770
Scouting	236,407	227,959
Publicity	185,463	180,939
Ticket Office	82,613	84,978
Training	462,787	561,787
Depreciation & Amort.	98,425	115,103
Office Pension Expense	36,974	87,777
Players Pension Expense	—	297,062
Total Expenses	8,374,087	9,273,651
Net Income before Extraordinary Items	554,466	(494,754)
Deferred Pension Expense	—	192,452
Judgement of Litigation	—	115,000
Net Income from	554,466	(802,206)

APPENDIX C

Plaintiffs' Exhibit 20

INTER-DEPARTMENTAL
USE BOTH SIDES

Date 3/24/77

To John R. Bunting, Chairman

From Gerald A. Hayes, Jr.

Subject Philadelphia Eagles Football Club

At our meeting on Monday, March 21st, I recommended a meeting with Leonard Tose where the Bank would deliver a list of terms under which we would continue to provide financing to the Eagles. My major reasons for recommending this meeting are as follows:

1. The Eagles are in default of at least seven covenants of our Loan Agreement. The most serious defaults were non-authorized withdrawals, and non-authorized personal expenses by Tose. This money has since been replaced by a capital contribution of $200,000 by Tose.
2. The Eagles have not been effectively managed, particularly on the financial side of the Club. In my opinion Jim Murray does not represent adequate financial management.
3. The Eagles have reported an operating loss for 1976 of $494,754 which compares to a profit of $554,446 in 1975. After considering extraordinary items in 1976 the loss is increased to approximately $1,150,000.
4. A projected cash flow of the Club for 1977 would indicate that they cannot make the required principal reduction of $500,000 on May 31, 1977. If they do make it from season ticket receipts, they would run out of money during the playing season.

5. Negotiations between the Players Association, the NFL and individual players are becoming more difficult, and should be given more attention particularly from a financial standpoint. I don't feel that present management is providing the proper kind of attention to these matters.

6. There has been a substantial growth in deferred player compensation in the past two years. This liability has grown to $852,248, of which $387,134 must be paid in 1977. No money has been set aside or annuity created to cover these obligations, and it could create a problem if a negative cash flow develops and deferrals are not booked at an increasing rate.

First Pennsylvania Bank, N.A.

INTER-DEPARTMENTAL
USE BOTH SIDES

Date 3/24/77

To John R. Bunting, Chairman

From Gerald A. Hayes, Jr.

Subject Page 2

My proposal is to let Leonard Tose know that the Bank is not satisfied with the way that the Club is being run, and that if we are to continue financing the Club he must agree to the following:

1. Give up control of all financial aspects of the Club.
2. Retain an individual to act as chief executive officer, acceptable to the Bank, who would have complete decision making power over the Club's finances to include expenses related to contract negotiations, the team, travel, games, administration, scouting, publicity, training and the disbursement of Tose's salary.
3. Remove his name as an authorized signer on the checking accounts of the Eagles.

Leonard's response to the foregoing will be negative, and I believe that he will respond by telling us that he is replacing us with new financing from another Bank. If he takes this position, we should allow him 30 days to find that financing and advise him that we are prepared to make demand on our loan against the Eagles and against Tose personally. We have the right to do this under the terms of the Agreement.

When Leonard is confronted with the loss indicated in the 1976 financial statement he will attempt to minimize that by pointing out that it includes the following:

1. A $350,000 expense for settling legal suits against the NFL.

2. A $115,000 charge for the settlement of the Don Chuy suit, which the Club is appealing.
3. A $192,452 charge for settlement of the pension demands of the Players Association.
4. Other expenses related to the new coaching staff which he will claim are non-recurring.

First Pennsylvania Bank, N.A.

INTER-DEPARTMENTAL
USE BOTH SIDES

Date 3/24/77

To John R. Bunting, Chairman

From Gerald A. Hayes, Jr.

Subject Page 3

Our strongest rebuttal to this is the fact that if all the expenses listed above were not considered, the Eagles would still have a loss of approximately $250,000. This type of performance can never amortize our loan of $6,849,687.

I have discussed this plan with legal counsel (Gil Oswald and Jay Cooke of the Schnader firm), and have tried to figure the sequence of events and what our best plan of action would be. I see the sequence as follows:

1. The meeting will be held with Leonard, and our demands will be presented to him.

2. He will take the alternative of replacement financing and we will give him thirty days to accomplish this.

3. Immediately after our meeting with Tose we should meet with Herb Barness and explain our plain, and try to get Barness to talk to Pete Rozelle to explain his position. Our counsel feels that this contact with Rozelle is critical, and will be very important if we have to force the sale of the Club. Gil Oswald feels that Pete Rozelle might even put the pressure on Tose if he knew the seriousness of this situation because he doesn't want the Eagles Franchise looking like a World Football League franchise.

4. When Tose can't find financing the Bank should contact Rozelle and indicate that we are going to take action against Tose and the Club.
5. The rest will depend on Rozelle's reaction to the pressure from Barness and the Bank.

GAH:dw

cc: George A. Butler, Vice Chairman
Cameron S. Clark, Executive Vice President
Joseph T. Drennan, Senior Vice President
Stuart B. Andrews, Vice President
First Pennsylvania Bank, N.A.